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ABSTRACT

In this report, the Senate Committee on Indian Affairs reports favorably on Senate Bill 569 to amend the Indian Child Welfare Act (ICWA) of 1978 and recommends its passage with an amendment. In enacting ICWA, Congress sought to: (1) protect the relationship between Indian children and their parents; (2) affirm the tribal right to participate meaningfully in placement decisions affecting Indian children; (3) preserve each Indian child's Indian heritage and, if possible, specific tribal affiliation; and (4) provide an orderly mechanism for resolving questions concerning state and tribal jurisdiction over Indian children. The purpose of Senate Bill 569 is to amend ICWA to provide additional procedures applicable to voluntary Indian child custody proceedings. These procedures will help ensure greater certainty, stability, and finality in child custody determinations without compromising the meaningful participation of tribes in Indian child placement decisions, a vital aspect of tribal sovereignty. Following the text of the bill, this report includes purposes of the bill, background on federal Indian child welfare policy in relation to ICWA's four objectives listed above, procedures applicable to ICWA, need for legislation, description of the substantive amendments (which place time restrictions on tribal and family intervention and provide for visitation agreements), summary of provisions, legislative history, section-by-section analysis, cost and budgetary considerations, executive communications, and changes in existing law. (SV)

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Calendar No. 295

105TH CONGRESS *1st Session*	SENATE	REPORT 105–156

AMENDING THE INDIAN CHILD WELFARE ACT OF 1978, AND FOR OTHER PURPOSES

NOVEMBER 13, 1997.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 569]

The Committee on Indian Affairs, to which was referred the bill (S. 569) to amend the Indian Child Welfare Act of 1978, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

The text of the bill follows:

MODIFIED LANGUAGE PROPOSED FOR S. 569 (TO MAKE A TECHNICAL CHANGE AND TO INCORPORATE A NEW SECTION 9 AND REDESIGNATE THE SUBSEQUENT SECTION).

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Indian Child Welfare Act Amendments of 1997".

(b) REFERENCES.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to or repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).

SEC. 2. EXCLUSIVE JURISDICTION.

Section 101(a) (25 U.S.C. 1911(a)) is amended—

(1) by inserting "(1)" after "(a)"; and

(2) by striking the last sentence and inserting the following:

"(2) An Indian tribe shall retain exclusive jurisdiction over any child custody proceeding that involves an Indian child, notwithstanding any subsequent change in the resi-

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dence or domicile of the Indian child, in any case in which the Indian child—

"(A) resides or is domiciled within the reservation of the Indian tribe and is made a ward of a tribal court of that Indian tribe; or

"(B) after a transfer of jurisdiction is carried out under subsection (b), becomes a ward of a tribal court of that Indian tribe.".

SEC. 3. INTERVENTION IN STATE COURT PROCEEDINGS.

Section 101(c) (25 U.S.C. 1911(c)) is amended by striking "In any State court proceeding" and inserting "Except as provided in section 103(e), in any State court proceeding".

SEC. 4. VOLUNTARY TERMINATION OF PARENTAL RIGHTS.

Section 103(a) (25 U.S.C. 1913(a)) is amended—

(1) by inserting "(1)" before "Where";

(2) by striking "foster care placement" and inserting "foster care or preadoptive or adoptive placement";

(3) by striking "judge's certificate that the terms" and inserting the following: "judge's certificate that—

"(A) the terms";

(4) by striking "or Indian custodian." and inserting "or Indian custodian; and";

(5) by inserting after subparagraph (A), as designated by paragraph (3), the following new subparagraph:

"(B) any attorney or public or private agency that facilitates the voluntary termination of parental rights or preadoptive or adoptive placement has informed the natural parents of the placement options with respect to the child involved, has informed those parents of the applicable provisions of this Act, and has certified that the natural parents will be notified within 10 days of any change in the adoptive placement.";

(6) by striking "The court shall also certify" and inserting the following:

"(2) The court shall also certify";

(7) by striking "Any consent given prior to," and inserting the following:

"(3) Any consent given prior to,"; and

(8) by adding at the end the following new paragraph:

"(4) An Indian custodian who has the legal authority to consent to an adoptive placement shall be treated as a parent for the purposes of the notice and consent to adoption provisions of this Act.".

SEC. 5. WITHDRAWAL OF CONSENT.

Section 103(b) (25 U.S.C. 1913(b)) is amended—

(1) by inserting "(1)" before "Any"; and

(2) by adding at the end the following new paragraphs:

"(2) Except as provided in paragraph (4), a consent to adoption of an Indian child or voluntary termination of parental rights to an Indian child may be revoked, only if—

"(A) no final decree of adoption has been entered; and

"(B)(i) the adoptive placement specified by the parent terminates; or

"(ii) the revocation occurs before the later of the end of—

"(I) the 180-day period beginning on the date on which the Indian child's tribe receives written notice of the adoptive placement provided in accordance with the requirements of subsections (c) and (d); or

"(II) the 30-day period beginning on the date on which the parent who revokes consent receives notice of the commencement of the adoption proceeding that includes an explanation of the revocation period specified in this subclause.

"(3) The Indian child with respect to whom a revocation under paragraph (2) is made shall be returned to the parent who revokes consent immediately upon an effective revocation under that paragraph.

"(4) Subject to paragraph (6), if, by the end of the applicable period determined under subclause (I) or (II) of paragraph (2)(B)(ii), a consent to adoption or voluntary termination of parental rights has not been revoked, beginning after that date, a parent may revoke such a consent only—

"(A) pursuant to applicable State law; or

"(B) if the parent of the Indian child involved petitions a court of competent jurisdiction, and the court finds that the consent to adoption or voluntary termination of parental rights was obtained through fraud or duress.

"(5) Subject to paragraph (6), if a consent to adoption or voluntary termination of parental rights is revoked under paragraph (4)(B), with respect to the Indian child involved—

"(A) in a manner consistent with paragraph (3), the child shall be returned immediately to the parent who revokes consent; and

"(B) if a final decree of adoption has been entered, that final decree shall be vacated.

"(6) Except as otherwise provided under applicable State law, no adoption that has been in effect for a period longer than or equal to 2 years may be invalidated under this subsection.".

SEC. 6. NOTICE TO INDIAN TRIBES.

Section 103(c) (25 U.S.C. 1913(c)) is amended to read as follows:

"(c)(1) A party that seeks the voluntary placement of an Indian child or the voluntary termination of the parental rights of a parent of an Indian child shall provide written notice of the placement or proceeding to the Indian child's tribe. A notice under this subsection shall be sent by registered mail (return receipt requested) to the Indian child's

tribe, not later than the applicable date specified in paragraph (2) or (3).

"(2)(A) Except as provided in paragraph (3), notice shall be provided under paragraph (1) in each of the following cases:

"(i) Not later than 100 days after any foster care placement of an Indian child occurs.

"(ii) Not later than 5 days after any preadoptive or adoptive placement of an Indian child.

"(iii) Not later than 10 days after the commencement of any proceeding for a termination of parental rights to an Indian child.

"(iv) Not later than 10 days after the commencement of any adoption proceeding concerning an Indian child.

"(B) A notice described in subparagraph (A)(ii) may be provided before the birth of an Indian child if a party referred to in paragraph (1) contemplates a specific adoptive or preadoptive placement.

"(3) If, after the expiration of the applicable period specified in paragraph (2), a party referred to in paragraph (1) discovers that the child involved may be an Indian child—

"(A) the party shall provide notice under paragraph (1) not later than 10 days after the discovery; and

"(B) any applicable time limit specified in subsection (e) shall apply to the notice provided under subparagraph (A) only if the party referred to in paragraph (1) has, on or before commencement of the placement, made reasonable inquiry concerning whether the child involved may be an Indian child.".

SEC. 7. CONTENT OF NOTICE.

Section 103(d) (25 U.S.C. 1913(d)) is amended to read as follows:

"(d) Each written notice provided under subsection (c) shall be based on a good faith investigation and shall contain the following:

"(1) The name of the Indian child involved, and the actual or anticipated date and place of birth of the Indian child.

"(2) A list containing the name, address, date of birth, and (if applicable) the maiden name of each Indian parent and grandparent of the Indian child, if—

"(A) known after inquiry of—

"(i) the birth parent placing the child or relinquishing parental rights; and

"(ii) the other birth parent (if available); or

"(B) otherwise ascertainable through other reasonable inquiry.

"(3) A list containing the name and address of each known extended family member (if any), that has priority in placement under section 105.

"(4) A statement of the reasons why the child involved may be an Indian child.

"(5) The names and addresses of the parties involved in any applicable proceeding in a State court.

"(6)(A) The name and address of the State court in which a proceeding referred to in paragraph (5) is pending, or will be filed; and

"(B) the date and time of any related court proceeding that is scheduled as of the date on which the notice is provided under this subsection.

"(7) If any, the tribal affiliation of the prospective adoptive parents.

"(8) The name and address of any public or private social service agency or adoption agency involved.

"(9) An identification of any Indian tribe with respect to which the Indian child or parent may be a member.

"(10) A statement that each Indian tribe identified under paragraph (9) may have the right to intervene in the proceeding referred to in paragraph (5).

"(11) An inquiry concerning whether the Indian tribe that receives notice under subsection (c) intends to intervene under subsection (e) or waive any such right to intervention.

"(12) A statement that, if the Indian tribe that receives notice under subsection (c) fails to respond in accordance with subsection (e) by the applicable date specified in that subsection, the right of that Indian tribe to intervene in the proceeding involved shall be considered to have been waived by that Indian tribe.".

SEC. 8. INTERVENTION BY INDIAN TRIBE.

Section 103 (25 U.S.C. 1913) is amended by adding at the end the following new subsections:

"(e)(1) The Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court only if—

"(A) in the case of a voluntary proceeding to terminate parental rights, the Indian tribe sent a notice of intent to intervene or a written objection to the adoptive placement to the court or to the party that is seeking the voluntary placement of the Indian child, not later than 30 days after receiving notice that was provided in accordance with the requirements of subsections (c) and (d); or

"(B) in the case of a voluntary adoption proceeding, the Indian tribe sent a notice of intent to intervene or a written objection to the adoptive placement to the court or to the party that is seeking the voluntary placement of the Indian child, not later than the later of—

"(i) 90 days after receiving notice of the adoptive placement that was provided in accordance with the requirements of subsections (c) and (d); or

"(ii) 30 days after receiving a notice of the voluntary adoption proceeding that was provided in accordance with the requirements of subsections (c) and (d).

"(2)(A) Except as provided in subparagraph (B), the Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court in any case in which the Indian tribe did not receive written notice provided in accordance with the requirements of subsections (c) and (d).

"(B) An Indian tribe may not intervene in any voluntary child custody proceeding in a State court if the Indian tribe gives written notice to the State court or any party involved of—

"(i) the intent of the Indian tribe not to intervene in the proceeding; or

"(ii) the determination by the Indian tribe that—

"(I) the child involved is not a member of, or is not eligible for membership in, the Indian tribe; or

"(II) neither parent of the child is a member of the Indian tribe.

"(3) If an Indian tribe files a motion for intervention in a State court under this subsection, the Indian tribe shall submit to the court, at the same time as the Indian tribe files that motion, a tribal certification that includes a statement that documents, with respect to the Indian child involved, the membership or eligibility for membership of that Indian child in the Indian tribe under applicable tribal law.

"(f) Any act or failure to act of an Indian tribe under subsection (e) shall not—

"(1) affect any placement preference or other right of any individual under this Act;

"(2) preclude the Indian tribe of the Indian child that is the subject of an action taken by the Indian tribe under subsection (e) from intervening in a proceeding concerning that Indian child if a proposed adoptive placement of that Indian child is changed after that action is taken; or

"(3) except as specifically provided in subsection (e), affect the applicability of this Act.

"(g) Notwithstanding any other provision of law, no proceeding for a voluntary termination of parental rights or adoption of an Indian child may be conducted under applicable State law before the date that is 30 days after the Indian child's tribe receives notice of that proceeding that was provided in accordance with the requirements of subsections (c) and (d).

"(h) Notwithstanding any other provision of law (including any State law)—

"(1) a court may approve, if in the best interests of an Indian child, as part of an adoption decree of that Indian child, an agreement that states that a birth parent, an extended family member, or the Indian child's tribe shall have an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption; and

"(2) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph (1) shall not be considered to be grounds for setting aside a final decree of adoption.".

SEC. 9. PLACEMENT OF INDIAN CHILDREN.

Section 105(c) (25 U.S.C. 1915(c)) is amended—

(1) in the second sentence—

(A) by striking "Indian child or parent" and inserting "parent or Indian child"; and

(B) by striking the colon after "considered" and inserting a period;

(2) by striking "*Provided*, That where" and inserting: "In any case in which"; and

(3) by inserting after the second sentence the following: "In any case in which a court determines that it is appropriate to consider the preference of a parent or Indian child, for purposes of subsection (a), that preference may be considered to constitute good cause.".

SEC. 10. FRAUDULENT REPRESENTATION.

Title I of the Indian Child Welfare Act of 1978 is amended by adding at the end the following new section:

"SEC. 114. FRAUDULENT REPRESENTATION.

"(a) IN GENERAL.—With respect to any proceeding subject to this Act involving an Indian child or a child who may be considered to be an Indian child for purposes of this Act, a person, other than a birth parent of the child, shall, upon conviction, be subject to a criminal sanction under subsection (b) if that person knowingly and willfully—

"(1) falsifies, conceals, or covers up by any trick, scheme, or device, a material fact concerning whether, for purposes of this Act—

"(A) a child is an Indian child; or

"(B) a parent is an Indian;

"(2)(A) makes any false, fictitious, or fraudulent statement, omission, or representation; or

"(B) falsifies a written document knowing that the document contains a false, fictitious, or fraudulent statement or entry relating to a material fact described in paragraph (1); or

"(3) assists any person in physically removing a child from the United States in order to obstruct the application of this Act.

"(b) CRIMINAL SANCTIONS.—The criminal sanctions for a violation referred to in subsection (a) are as follows:

"(1) For an initial violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 1 year, or both.

"(2) For any subsequent violation, a person shall be fined in accordance with section 3571 of title 18, Unit-

ed States Code, or imprisoned not more than 5 years, or both.".

PURPOSES

The purpose of S. 569 is to amend the Indian Child Welfare Act to provide additional procedures applicable to voluntary Indian child custody proceedings. The amendments contained in S. 569 will help ensure greater certainty, stability, and finality in child custody determinations without compromising the longstanding recognition that the opportunity to meaningfully participate in placement decisions affecting enrolled or eligible children is a vital aspect of the inherent sovereignty of tribal governments.

BACKGROUND

FEDERAL INDIAN CHILD WELFARE POLICY

In enacting the Indian Child Welfare Act (ICWA or Act) of 1978, Congress sought to achieve the following objectives: protecting the relationship between Indian children [1] and their parents; affirming the tribal right to meaningfully participate and/or preside over placement decisions affecting Indian children; preserving each Indian child's Indian heritage and, wherever possible, its specific tribal affiliation; and providing an orderly mechanism for resolving questions concerning state and tribal court jurisdiction over Indian children.

Testimony and other evidence presented to this Committee and to previous Congresses reveal that in the vast majority of cases, the ICWA accomplishes these important objectives. In a few highly publicized cases, however, the Act falls short of fulfilling Congressional objectives. These problems can be largely attributed to the Act's lack of explicit procedures for how and when a child's tribe is to be notified in some adoptions. These cases have created the very type of conflict and protracted litigation that Congress sought to eliminate by enacting the ICWA.

S. 569 seeks to extend the benefits of greater certainty, stability, and finality to all child custody proceedings covered by the ICWA. The bill's provisions are largely procedural. S. 569 clarifies or prescribes procedures to eliminate the conflicts that sometimes result when the absence of immediate notice to the child's tribe forces the tribe to choose between waiving its ICWA-codified rights or intervening late in a child custody proceeding. Such late intervention is often opposed by the other participants in the proceeding. These opposing parties claim that tribal intervention disrupts their settled expectations. Tribes respond that the absence of explicit notification procedures often prevents them asserting their legitimate interests in a more timely fashion.

In favorably reporting S. 569, the Committee believes that its procedural reforms are entirely consistent with the objectives that Congress sought to achieve when it enacted the original Act. Fur-

[1] 25 U.S.C. 1903(4) includes any unmarried person under 18 years old who is either enrolled or elibile for enrollment in an Indian tribe in its definition of "Indian child," if they are the biological child of a member of an Indian tribe.

thermore, its provisions protect the success that has been reported in other areas where the ICWA applies.

I. Protecting the relationship between Indian children and their parents

Testimony presented to the 95th and previous Congresses revealed what the House Committee on Interior and Insular Affairs characterized as "the wholesale separation of Indian children from their families" and the placement of these children in institutions or non-Indian environments.[2] Congress found that a number of factors were responsible for the disproportionate placement of Indian children in foster care and adoptive homes, including the application of culturally inappropriate standards to Indian parenting, unequal treatment of Indian parents by state courts and social workers, inadequate representation of Indian parents in child custody proceedings, and the invidious coercion of parents to voluntarily waive parental rights.

To address this unfortunate reality, Congress required proof that active efforts and remedial measures were provided before a party could seek the foster care placement of a child or the termination of parental rights.[3] Indigent Indian parents were guaranteed legal representation in all of the child custody proceedings covered by the Act.[4]

Congress determined that states and their courts were largely responsible for the problems the ICWA was intended to correct. Evidence presented to the 95th Congress and a contemporaneous U.S. Supreme Court decision provided strong evidence that the use of vague standards such as "in the child's best interest" or removing a child based on "neglect," or "social deprivation" were likely to result in the unnecessary removal of children from their families.[5] Furthermore, once children were removed from their families, state social workers would sometimes actively try to prevent family reunification.[6]

While the ICWA does not divest states of jurisdiction over all off-reservation child custody proceedings, it does establish uniform federal standards before an Indian child may lawfully be removed from his or her birth family. These standards and procedures are intended to prevent state officials from using subjective criteria as

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[2] H. Rep. 95–1386, p. 9. The American Indian Policy Review Commission shared these concerns and made the reform of child custody proceedings one of its primary recommendations. Final Report, May 17, 1977, American Indian Policy Review Commission, p. 422–23. This matter was also addressed by previous Congresses: Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 93rd Cong., 2d Session 70 (1974); and Indian Child Welfare Act of 1977: Hearing on S. 1214 before the Senate Select Comm. on Indian Affairs, 95th Cong. 1st Sess. (1977).

[3] 25 U.S.C. 1912(d).

[4] 15 U.S.C. 1912(b).

[5] *Smith* v. *Organization of Foster Families for Equalization and Reform* (OFFER), 431 U.S. 816 (1977).

[6] "Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family *rather than return the child* to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child." *Smith* v. *OFFER*, 431 U.S. at 834 (1977) (italics added). The Court went onto note: "Moreover, judges too may find it difficult, in utilizing vague standards * * * to avoid decisions resting on subjective values." *id.* at n. 36.

a basis for removing Indian children from their birth families.[7] Except where there is clear proof that it is not in the best interest of the child, Indian families are to be kept intact. For example, before a state court may terminate the parental rights of an Indian parent, the state must demonstrate by proof beyond a reasonable doubt that continued custody of the child would result in serious emotional or physical damage.[8] Foster care placements can only be ordered upon proof by clear and convincing evidence that such damage will occur if the child remains in the custody of its parents or guardian.[9] Finally, the Act provides that any of the Act's minimum requirements may be replaced by any other applicable state or federal law which provides higher standards of protection for the rights of Indian parents or custodians.[10]

The 95th Congress also found reason to question whether many ostensibly "voluntary" relinquishments of parental rights were, in fact, the product of actual informed consent. Under the ICWA, such consent must be executed in writing and then recorded before a judge. A judge must then certify that the consequences of the decision are understood by the parent(s), including circumstances in which effective communication requires cross-cultural and language translation. Finally, such consent is not valid if it is executed before the birth of a child or within ten days after his birth.[11]

Some commentators suggest a need for more extensive reductions in state jurisdiction over Indian child custody proceedings in order to protect the relationship between Indian children and parents.[12] Although the ICWA does not divest states of this jurisdiction, tribal court jurisdiction is intended to reinforce the interest of both tribes and tribal member parents.

II. Affirming a tribe's ability to meaningfully participate and/or preside over placement decisions affecting Indian children

As the U.S. Supreme Court recognized in 1989: "at the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings." *Mississippi Band of Choctaw Tribe* v. *Holyfield*.[13] The Act affirms exclusive tribal jurisdiction over children who reside or are domiciled on the tribe's reservation.[14] The law "creates concurrent but presumptively tribal jurisdiction in the care of children not domiciled on the reservation; on petition of either the parent or the tribe, state-court proceedings for foster care

[7] In *Santosky* v. *Kramer*, 455 U.S. 745 (1982), the U.S. Supreme Court ruled that the Due Process Clause of the U.S. Constitution requires a legal standard no less stringent than "clear and convincing" evidence before parental rights may be terminated. One of the Court's primary concerns was a desire to address the "imprecise substantive standards" applied in permanent neglect proceedings. These standards "leave determinations unusually open to the subjective values of the judge." *Id.* at 762.

[8] 25 U.S.C. 1912(f). This provision and 25 U.S.C. 1912(e) both explicitly require "testimony of qualified expert witnesses."

[9] 25 U.S.C. 1912(e).

[10] 25 U.S.C. 1921.

[11] 25 U.S.C. 1913(a).

[12] One commentator complained that the Act leaves "[m]ost of the major procedural safeguards * * * entrusted to the child welfare agencies and state courts, which Congress had considered responsible for the problem initially." Barsh, "The Indian Child Welfare Act of 1978: A Critical Analysis," 31 Hastings L.J. 1287, 1334 (1980).

[13] 490 U.S. 30 (1989).

[14] 25 U.S.C. 1911(a).

placement or termination of parental rights are [generally] to be transferred to the tribal court. * * *"[15]

In the Act's legislative findings, Congress explained its rationale for recognizing broad tribal court jurisdiction over child custody proceedings: "States * * * have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[16]

The jurisdictional provisions of the Act accomplish several objectives. First and foremost, they recognize that tribal jurisdiction over child custody proceedings is an attribute of each tribe's inherent sovereignty. As *Holyfield* recognized: "[t]ribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA. Indeed, some of the ICWA's provisions have a strong basis in pre-ICWA case law in federal and state courts."[17] A concurring opinion in a contemporaneous Arizona Supreme Court decision provided another compelling reason for state courts to defer to tribal courts in involuntary Indian child custody proceedings.

> Often the tribal court's insight into tribal cultural values and way of life will make it the best forum for such a determination. Although we are not social scientists, as judges we must be aware of the fact that acts which mean one thing in our culture may have a very different meaning in another culture. What I might see as circumstances implying abandonment may well be culturally-prescribed parental behavior in another social structure. A child left in a grandparent's care for an apparently lengthy period may, in fact, be a normal period of training for adult tribal responsibility.[18]

As the *Holyfield* Court recognized, a number of state and federal courts had found a strong legal and factual basis for deferring to tribal court jurisdiction over child custody proceedings involving enrolled or eligible children. In addition to each tribal court's familiarity with the tribe's child-rearing customs, courts found that child custody proceedings were easily within the reach of the issues characterized by the Supreme Court as "essential tribal relations" in the benchmark decision *Williams* v. *Lee.*[19] In *Williams* v. *Lee,* the Supreme Court explained that state court jurisdiction violates federal policy if this jurisdiction interferes with a tribe's authority to "make their own laws and be ruled by them." Applying this principle to child welfare proceedings, one seminal case explained: "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity. That sovereignty, as the Supreme Court has noted 'predates that of our own government.'"[20]

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[15] *Holyfield,* 490 U.S. at 36.
[16] 25 U.S.C. 1901(5).
[17] *Holyfield,* 490 U.S. at 92, citing *Wakefield* v. *Little Light,* 276 Md. 333, 347 A.2d 228 (1975) and *Wisconsin Potowatomies* v. *Houston,* 393 F.Supp. 719 (W.D. Mich., 1973).
[18] In re Duryea, 563 P.2d 885, 888 (Ariz. 1977).
[19] 358 U.S. 217 (1959).
[20] *Wisconsin Potowatomies* v. *Houston,* 393 F. Supp. 719, 730 (1973).

Recognizing that tribal courts are the appropriate institutions for determining whether a child should be removed from its parents reinforces each tribe's authority to define and enforce its own standards for what constitutes acceptable parenting practices. This allows tribes to preserve and develop their culture because it allows tribes to assess parental behavior by culturally appropriate standards. Tribal leaders testified that no area is more important for the preservation of tribal culture than the ability to define appropriate family behavior. As one tribal leader explained:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child-rearing.[21]

Although tribal advocates testified strongly in favor of broad tribal court jurisdiction, they agreed that preserving the parent-child relationship should take precedence over the full exercise of tribal court jurisdiction. Thus, where parents of an Indian child reside off-reservation, the Act protects the right of either parent to block the transfer of an involuntary child custody proceeding to tribal court.[22]

Because the residence chosen by the parent of an Indian child may allow them to choose between state and tribal court jurisdiction, some have asserted that parents should be able to bypass the other procedures and remedies included in the Act at the behest of tribes.[23] This argument fails to account for the Act's underlying basis and one of Congress' clear objectives.[24] Congress found that the interests of neither Indian children nor their tribes would be served if the direct relationship between tribes and Indian children was not given the proper measure of recognition and protection.[25] As the Supreme Court explained in *Holyfield:* "[t]he protection of

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[21] Honorable Calvin Isaac, Tribal Chief, Mississippi Band of Choctaw Indians, as quoted in *Holyfield*, 490 U.S. at 34–5.

[22] Congress was also aware that there might be a number of factors and circumstances where an Indian parent residing off-reservation might determine that it was in their best interest to appear and defend child custody proceedings in that (state court) setting. For example, for a tribal member parent residing off-reservation, returning to a reservation to appear in tribal court might impose a costly travel burden, as well as threaten both employment and an already unstable family environment.

[23] For example, in *Holyfield*, the dissent asserted that tribal members who reside on reservation should also be allowed to avoid tribal court jurisdiction.

[24] If the ICWA was interpreted to allow reservation-domiciled parents to avoid tribal court jurisdiction, as urged by the minority in *Holyfield*, or to allow off-reservation tribal members to preclude the Act's application in matters like tribal intervention, the Act would actually reduce or eliminate the rights tribes posses under the state and federal court decisions which preceded the statute. For example, *Williams* v. *Lee*, 258 U.S. 217 (1959) and its progeny require exclusive tribal court jurisdiction over domestic-relations matters concerning reservation residents.

[25] Indeed, the Supreme Court addressed this very issue in *Holyfield*. That case arose when tribal member parents left their reservation with the express intent of having their children born off-reservation and immediately offering them for adoption. They took these steps in an effort to circumvent exclusive tribal jurisdiction over the adoption of their twin children. The Supreme Court refused to allow actions by the parents to defeat the rights of either the Indian child or the child's tribe. The Supreme Court ruled that the Choctaw tribal court possessed exclusive jurisdiction over any adoption proceeding involving the twins. Furthermore, the Court refused to allow the parent's actions to eliminate the protection Congress provided to Indian children. As the Court explained, "Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the impact *on the children themselves* of such placements *outside their culture*." *Holyfield*, 490 U.S. at 49-50 (italics added). Significantly, the Court found this objective relevant to a case involving children who had never resided on a reservation.

this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interest of the parents."[26] Based on evidence concerning the effect on Indian children of separation from the tribes, the Act includes a number of provisions that are concerned with the relationship between an Indian child and its tribe, in addition to those involving the child's relationship with its tribal-member parent(s).

For example, even where a tribal court does not obtain jurisdiction over a child custody proceeding, the tribe may intervene in a state court proceeding.[27] Most important, current law requires that tribes be notified of involuntary child custody proceedings.[28] The Act precludes state courts from ordering foster care placement or terminating parental rights until notice is provided to the Indian child's parent or custodian and the child's tribe or, where appropriate, the Secretary of Interior.[29] The law also ensures that all parties to such a proceeding may examine all of the relevant documents provided to the court.[30] These carefully crafted provisions provide tribes with a full and meaningful opportunity to participate in these proceedings. Lastly, the Act provides tribes with the opportunity to provide testimony and ensure that state courts are aware of the Act's requirements.[31]

Congress was also concerned that tribal court decisions would be rendered meaningless if the decisions made by tribal courts could simply be relitigated in state court. To prevent this from occurring, the Act included provisions requiring the courts and agencies of the federal, state, and territorial governments to give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe for Indian child custody proceedings.[32]

To ensure compliance with the Act, the parent or custodian of an Indian child, the child's tribe, or the state is authorized to petition for the invalidation of any action that violates the Act's terms, including provisions concerning jurisdiction, notice, and procedures and standards for voluntary termination of parental rights.[33]

III. Preserving each Indian child's Indian heritage and, wherever possible, its specific tribal affiliation

The ICWA's paramount objective is to serve the best interests of Indian children. Reflective of this goal, the Act and its legislative history contain references and provisions relating to the importance of preserving each child's Indian heritage and tribal affiliation.

For example, the law defines preferences favoring placement with a child's extended family, a member of the child's tribe, and

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[26] Id., at 52, (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)).
[27] 25 U.S.C. 1911(c).
[28] 25 U.S.C. 1912(a) requires notice of involuntary child custody proceedings. In *Holyfield*, the Supreme Court interpreted 25 U.S.C. 1911(c) to allow tribal intervention in "any action resulting in the termination of the parent-child relationship." *Holyfield*, 490 U.S. at 38 n. 12. Thus, tribes may intervene in either voluntary or involuntary proceedings that may result in the termination of parental rights. However, the time frames and procedures for notifying tribes do not necessarily apply to voluntary proceedings. S. 569 will clarify that a tribe has the right to notice of any proceeding where it may intervene.
[29] 25 U.S.C. 1912(a).
[30] 25 U.S.C. 1912(c).
[31] 25 U.S.C. 1911(c).
[32] 25 U.S.C. 1911(d).
[33] 25 U.S.C. 1914.

then with other Indian families. Congress determined that a child's Indian heritage should be taken into account because of serious concerns about the effect of these placements on both tribes and Indian children. In its report accompanying this provision, the 95th Congress explained: "[t]his section seeks to protect the rights of the Indian child *as an Indian* and the rights of the Indian community and tribe in retaining its children in its society."[34] The Supreme Court characterized this provision as "[t]he most important substantive requirement imposed on state courts. * * *"[35]

The hearing record of the 95th Congress reveals substantial evidence that state courts and private adoption agencies failed to recognize each tribe's interest in providing foster care or adoptive placements within the child's extended family, within the tribe, or with other Native American families. These entities appeared unaware or unconcerned with the effect that placements with non-Indian families had on Indian children or their tribes.

The Act's placement preferences were created to ensure that state courts would fully consider the petitions of those within one of the preferred classes. These applicants must also be considered in the order that Congress established to serve the best interests of the Indian children and their tribes.[36] State courts may only reject these preferred applicants upon a finding of good cause that the placement is not in an Indian child's best interest. By requiring a finding of good cause, Congress responded to evidence that: "[d]iscriminatory standards have made it virtually impossible for Indian couples to qualify as foster or adoptive parents."[37] In addition, this procedure ensures that any rejection of an applicant will include the trial judge's findings and conclusions, which are then subject to appellate review.[38]

The second title of the Indian Child Welfare Act sought to address concerns that inadequate attention and resources were allocated towards establishing on-reservation foster care and adoptive placements by authorizing the Secretary to make grants to establish Tribal Indian Child and Family Service Programs. Among other objectives, these programs are authorized to license and regulate foster care and adoptive placements that may receive funds under Titles IV–B and XX of the Social Security Act.[39]

An Indian tribe has the right to obtain state records pertaining to the placement of Indian children.[40] The ICWA also provides for agreements between tribes and states with regard to the care and custody of Indian children and jurisdiction over child custody proceedings.[41] For those instances where a child is separated from its

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[34] H. Rep. 95–1386, 2d Session, 1978, at page 23 (italics added).

[35] *Holyfield*, 490 U.S. at 36.

[36] 25 U.S.C. 1915(a). The Act also allows each Indian tribe to establish placement preferences that apply when state courts have jurisdiction over the placement of children of that tribe. 25 U.S.C. 1915(c).

[37] H. Rep. 95–1386, p. 11.

[38] The Committee is also concerned about reports that appellate review has proven to be an inadequate means of ensuring state court compliance with the Act's placement preferences. The Indian Law Deskbook compiled by the Conference of Western Attorneys General (CWAG) concedes that: "[s]tate appellate courts, however, have evinced a reluctance to overturn good-cause findings by trial courts, even when those findings have been based on grounds seemingly less compelling than those in the [BIA's ICWA] guidelines." CWAG, American Indian Law Deskbook, 379 (1993).

[39] 25 U.S.C. 1931.

[40] 25 U.S.C. 1915(e).

[41] 25 U.S.C. 1919.

tribal culture, the Act includes a procedure to allow individuals to obtain information about their tribal affiliation and "such other information as may be necessary to protect any rights flowing from the individual's tribal relationship."[42] These provisions demonstrate Congressional recognition of the paramount importance that Indian heritage plays in the successful and healthy development of Indian children and cultures.

IV. Providing an orderly mechanism for resolving questions concerning state and tribal court jurisdiction over Indian children

Testimony presented to the 104th and 105th Congress revealed that in the vast majority of instances, the ICWA has improved the efficiency of child custody proceedings. Like the Uniform Child Custody Jurisdiction Act (UCCJA), the ICWA resolves jurisdictional ambiguities that had previously depleted the time and resources of those involved with child custody proceedings. Before enactment of the ICWA, participants in child custody proceedings involving Indian children, including courts, were required to resolve complicated jurisdictional questions prior to turning their attention to the merits of a case. As the Committee was aware in 1978 and as the Supreme Court recognized in 1989, state and federal courts were trying to develop policies for dealing with these complicated issues on a case-by-case basis. By legislating on these questions, Congress was able to hold extensive fact-findings hearings, consider testimony on various versions of the Act, and finally enact a law that balanced competing concerns and replaced the disparate approaches to these issues in numerous state and federal jurisdiction with procedural certainty for most cases.

The procedures applicable to the ICWA

Concerns about involuntary child custody proceedings were primarily addressed through the substantive and procedural requirements discussed above. These procedures have become a relatively common component of state court cases in which Indian parents face the involuntary placement of their children in foster care or the termination of parental rights. Since involuntary child custody proceedings are by their nature adversarial, the ICWA reformed the practices that often prejudiced the rights of Indian parents. By protecting a child from involuntary separation from its parents, the ICWA also protected Indian children from temporary and permanent out-of-home placements that threatened the child's Indian heritage and tribal affiliation.

In the context of nonadversarial child custody matters, however, procedures for integrating these protections proved more problematic. In involuntary proceedings, there is an easily recognized point when tribal intervention becomes necessary to protect parental rights and a child's tribal heritage. By contrast, it is more difficult to define an analogous point in voluntary child custody proceedings. Some of the testimony presented to the 95th Congress included concerns that procedural constraints would be overly-broad if they applied to all voluntary placements made by parents.[43]

[42] 25 U.S.C. 1317.
[43] See, e.g. 1977 Hearings at 192–216, 431–74; and Barsh, at 1313.

Nevertheless, as the Supreme Court recognized in *Holyfield*: "Congress determined to subject such [voluntary] placements to the ICWA's jurisdiction and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents."[44] In the context of voluntary placements, the final version of the ICWA includes strong substantive protections for tribal interests, including, most notably, placement preferences. Also, courts, including the U.S. Supreme Court, have interpret the ICWA as providing a tribal right to intervene in voluntary adoptions.[45] As enacted, however, the Act lacks an explicit procedure for incorporating these substantive rights into all voluntary adoption proceedings. For example, in circumstances where an adoptive placement occurs in a proceeding separate and apart from the voluntary or involuntary termination of parental rights, the ICWA does not specify how or when a tribe is to be notified.

The Need for Legislation

Based on testimony presented to the 104th and 105th Congresses, the Committee recognizes that the lack of explicit ICWA procedures in voluntary child custody placements has led to a few highly publicized cases where courts have been faced with difficult and often divisive choices that clearly could have been avoided if the ICWA's substantive terms were integrated sooner in the consideration of placement decisions affecting Indian children. In addition, some of the higher profile cases have involved deliberate attempts to hide or conceal a child's Indian heritage.[46]

There is no dispute that in some instances, unscrupulous adoption promoters, including some attorneys, have abused the absence of specific procedures by encouraging those wishing to facilitate the adoption of an Indian child to hide or obscure a child's tribal heritage either when a placement is first made[47] or when a petition is filed for an adoption decree.

The Committee was also presented with testimony from adoption professionals who are concerned that present law allows tribes to intervene at any time in an adoption proceeding until a final decree is entered. The Committee recognizes that the interests of those concerned with the adoption of Indian children are best served by encouraging tribes to intervene, if the tribes deem it necessary to do so, as early as possible. Further, as a part of the compromise included in S. 569, the Committee agrees to encourage timely tribal participation by limiting the time during which a tribe may intervene in a voluntary adoption proceeding. Indian tribes have testified that they are willing to accept this constraint in exchange for

[44] *Holyfield*, 490 U.S. at 50.

[45] Id., 490 U.S. at 39 n.12.

[46] Indeed, one of the cases that brought the need to amend the Act to the Committee's attention arose under these facts. As one of the witnesses explained: "In the *Rost* case, as in countless others, the former attorney really knew [the children] were Native American. This wasn't a problem with the birth parents lying. The adoption attorney . . . chose not to give notice to the tribe, not to tell the adoption agency which became involved, and not to tell my clients, the Rosts, that they were taking children into their care that had Native American heritage." S. Hrng. 104–574, June 26, 1996, at 41, Statement of Jane Gorman, Esq.

[47] It is common for a child to be placed with a prospective adoptive family for a period of months and sometimes more than a year before a petition is filed to either terminate parental rights or initiate adoption proceedings.

explicit procedures to ensure that they receive timely and adequate notice of such proceedings.

DESCRIPTION OF THE "TULSA" COMPROMISE

As discussed more fully in S. Rep. 104–335, discussions between adoption professionals and tribal representatives revealed that the interests of the adoptive families, tribes, and most of all, Indian children were not served by a system that left adoptions subject to collateral attack if tribes were not given notice of a voluntary adoption and which placed no limits on when a tribe may intervene. These discussions commenced at the June 1996 mid-year convention of the National Congress of American Indians (NCAI) at Tulsa, Oklahoma. On June 26, 1996, a legislative hearing before the Senate Indian Affairs Committee addressed the need for procedural clarity in voluntary child custody proceedings.[46] Working together, tribal representatives and adoption professionals identified changes that would address problems with the ICWA's implementation in ways that both adoption advocates and Indian tribes would find acceptable. On July 16, 1996 Senator McCain introduced S. 1962 with ten immediate cosponsors. S. 1962 was passed by the Committee and the Senate, but was not acted upon by the House of Representatives during the 104th Congress.

Both the National Indian Child Welfare Association (NICWA) and the National Congress of American Indians (NCAI) were actively involved in efforts to craft the "Tulsa" compromise, as were representatives of those participating in the compromise negotiations, as were representatives of the American Academy of Adoption Attorneys (AAAA) and the Academy of California Adoption Attorneys (ACAA). These groups indicate that S. 569, which tracks the provisions of S. 1962 from the 104th Congress, is well within the parameters of, and is consistent with the consensus initially reached in Tulsa, Oklahoma in June 1996 and subsequently refined in negotiations between these groups. Testimony at the Committee's June 18, 1997 hearing confirms that a consensus exists between these groups.

The central theme of the "Tulsa" compromise is that the Act should be amended to ensure greater certainty, stability, and finality in voluntary adoptions by guaranteeing early and effective notice to tribes in all cases involving Indian children. These procedures are balanced by new, strict time restrictions placed on both the right of Indian tribes and families to intervene and the right of Indian birth parents to revoke their consent to an adoptive placement. S. 569 would encourage early identification of the relatively few cases involving controversy, and promote settlement of cases by making visitation agreements enforceable.

Limitations on when and how on Indian tribe may intervene

25 U.S.C. 1911(c) would be substantially amended to curtail the present right of an Indian tribe to intervene "at any point in the proceeding." Under S. 569, this right of intervention could be exercised only within the following periods of time: within 30 days of receipt of notice of a termination of parental rights proceeding, or

[46] S. Hrng. 104–574, June 26, 1996.

within the later of 90 days of receipt of notice of an adoptive placement or 30 days of receipt of notice of a voluntary adoption proceeding. With proper notice, an Indian tribe's failure to act within these time frames early in the placement proceedings is final.[49] An Indian tribe's waiver of its right to intervene is binding. If an Indian tribe seeks to intervene in a timely manner, it must accompany its motion with a certification that the child at issue is, or is eligible to be, a member of the tribe and provide documentation of this pursuant to tribal law.

Limitations on when an Indian birth parent may withdraw his or her consent to adoption or termination of parental rights

25 U.S.C. 1913(b) would be substantially amended by S. 569 to curtail the present right of an Indian birth parent to withdraw his or her consent to an adoption placement or termination of parental rights at any time prior to entry of a final decree. Under S. 569 such consent could be withdrawn before a final decree of adoption has been entered only if the adoptive placement specified by the parent is terminated, or before the end of the later of the following periods: 6 months after the Indian child's tribe received the required notice or 30 days after the adoption proceeding began, as specified. An Indian birth parent may otherwise revoke consent only under applicable state law. In the case of fraud or duress, an Indian birth parent may seek to invalidate an adoption up to two years after the adoption has been in effect, or within a longer period established by applicable state law.

Requirement of early and effective notice and information to Indian tribes

25 U.S.C. 1913 would be substantially amended by S. 569 to add a requirement for notice to be sent to the Indian child's tribe by a party seeking to place the child or effect a voluntary termination of parental rights concerning a child reasonably known to be an Indian. Such notice must be sent by registered mail within 100 days following a foster care placement, within five days following preadoptive placement or adoptive placement, or within 10 days of the commencement of a termination of parental rights proceeding or adoption proceeding. S. 569 would specify the particular information that is provided. In addition, 25 U.S.C. 1913(a) would be amended by S. 569 to require a certification by the state court that the attorney or public or private agency facilitating the voluntary termination of parental rights or adoptive placement has informed the birth parents of their placement options and of other provisions of the ICWA and has certified that the birth parents will be notified within 10 days of any change in adoptive placement.

Open adoptions and enforceable visitation agreement encouraged between Indians and non-Indians

25 U.S.C. 1913 would be amended by S. 569 to encourage and facilitate voluntary adoption agreements between Indian families or tribes and non-Indian adoptive families for enforceable rights of visitation or continued contact after entry of an adoption decree.

[49] This provision is not intended to preempt state law concerning permissive intervention.

This provision would have the effect of authorizing such agreements where local law does not provide for such arrangements. The committee determines that this specific reform will, in some cases, encourage early resolution of otherwise controversial cases.

Penalties applied for fraud and misrepresentation

S. 569 would apply criminal penalties to any efforts to encourage and facilitate fraudulent representations or omissions regarding whether a child or birth parents is an Indian for purposes of the Act.

Miscellaneous

S. 569 would clarify that the exclusive jurisdiction of tribal courts under 25 U.S.C. 1911(a) continues once a child is properly made a ward of that tribal court, regardless of any subsequent change in residence or domicile of the child.

Other considerations

Several parties have submitted testimony urging the Committee to address state court cases applying the so-called "existing Indian family" exception to the ICWA. Because of concerns expressed by part of the coalition supporting S. 569, the Committee must balance the benefits of addressing this matter directly versus the likelihood of disrupting the consensus that has produced and supported this compromise. Upon consideration, the Committee finds it unnecessary to address this potentially divisive matter because many of the cases applying this doctrine may be otherwise resolved through the application of the existing terms of the Act or the clarifications embodied in S. 569.

Most importantly, the provisions of S. 569 are intended to preclude situations where state courts have felt constrained to apply this doctrine in order to avoid what they perceive to be an inequitable result. Testimony before the Committee confirms that the absence of specific procedures or requirements for integrating tribal participation in voluntary child custody proceedings results in placements occurring without any notice to a child's tribe. Often a child's parent(s) or a private agency will place a child with a prospective adoptive family for a period of months or even years before an adoption decree or termination of parental rights is filed. (Sometimes judicial proceedings will trigger tribal notification.) This scenario makes it much more likely that a conflict will arise between the tribe and the prospective adoptive family. Faced with circumstances where a child has been placed with one family for an extended period of time, prior to tribal intervention and application of the ICWA, state courts have demonstrated an unwillingness to meaningfully consider the placement preferences established by the ICWA.

In some respects, these developments parallel the conflict that preceded the Supreme Court's decision in *Holyfield*. State courts first applied the "existing Indian family" exception to avoid the Act's preference for tribal court adjudication of child custody proceedings. After the Supreme Court's decision in *Holyfield*, state courts followed the Act's dictates more closely, deferring to tribal forums. As Judge Monroe G. McKay, a member of the United

States Court of Appeals for the 10th Circuit explained in 1991, state courts and non-Indians were initially apprehensive about tribal court jurisdiction over adoptions of Indian children by non-Indians. In practice, fears about tribal court jurisdiction turned out to be unfounded. As Judge McKay explained about one high-profile case: "[t]he result reached by the Navajo Court * * * is more flexible and resolves more problems than I was accustomed to seeing in my many years of practice in adoption work, in the courts of Arizona, and in child custody matters in the divorce work which I did over the many years."[50]

Although no change in the statute's terms are needed to effect the Committee's intent, the Committee takes this opportunity to clarify Section 1915. Specifically, by creating a "good cause" exception, Congress did not intend to adopt an open-ended best interest approach in deciding whether the placement preferences should be applied. The Montana Supreme Court's recent decision best captures the Committee's views on this subject.

> We believe, however, that a finding of good cause cannot be based simply on a [state court] determination that placement outside the preferences would be in the child's best interests. The plain language of the Act read as a whole and its legislative history clearly indicate that state courts are a part of the problem the ICWA was intended to remedy. The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture. It therefore seems "most improbable" that Congress intended to allow state courts to find good cause whenever they determined that a placement outside the preferences of § 1915 was in the Indian child's best interests.[51]

At the Committee's June 18, 1997 hearing, the U.S. Department of Justice testified in favor of S. 569. In its testimony, the Department explained that "ICWA is a Constitutionally-valid statues that is closely tied to Congress' unique obligations to Indian tribes by protecting the best interest of Indian children and families while promoting tribal rights and self-government." The Department also explained that "[a]s it exists and when amended by these proposed bills [S. 569 and H.R. 1082] it is our belief that ICWA is Constitutional."

The ICWA demonstrates Congress' longstanding recognition that the Federal trust responsibility and the role of Indian tribes as parens patriae extend to all Indian children involved in all child custody proceedings. The constitutional legitimacy of Indian-specific legislation has long rested upon the basis of a political classification which is unique to Indians and not upon a racial classification.[52] It is a well settled principle in Federal-Indian law that Indian tribes have the authority to define their membership and that this authority is integral to the survival of tribes and the exercise

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[50] Tribal Courts Act of 1991 and Report of U.S. Commission on Civil Rights Entitled "Indian Civil Rights Act," S. Hrng. 102-496, 1991, page 9.

[51] *In re Adoption of Riffle*, 922 P.2d 510, 514 (1996) (citing *Holyfield*).

[52] See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974).

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of their sovereignty as tribal governments. As the United States Supreme Court has explained:

> A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters. (citations omitted)[53]

When the ICWA was enacted, it is clear from the statute and from the legislative history that the Congress intended to reaffirm these principles and to provide for tribal involvement with, and Federal protections for, all children defined by their tribes as members or eligible for membership who are involved in any child custody proceeding, regardless of their individual circumstances.

SUMMARY OF THE PROVISIONS

Ward of the court. Section 2 adds a provision to 25 U.S.C. 1911(a) to clarify that an Indian tribe retains exclusive jurisdiction over any child made a ward of a tribal court if the child subsequently changes residence and domicile. The Committee intends this amendment to clarify that exclusive jurisdiction over a ward of a tribal court occurs only if, at the time the wardship is established, the child is a resident of or domiciled on an Indian reservation or the proceeding has been transferred to the tribal court pursuant to a valid State court order transferring jurisdiction.

Tribal interventions in State court proceedings. Sections 3 and 8 provide new limitations on the right of an Indian tribe to intervene in State court proceedings involving Indian children. Section 3 makes a conforming, technical amendment which recognizes that tribal interventions in voluntary proceedings under 25 U.S.C. 1911(c) will hereafter be governed by the time limitations and other provisions set forth in section 8 of these amendments. In enacting S. 569, the Committee intends to ensure that tribes will be notified and will have the opportunity to participate in all voluntary child custody proceedings. The Committee intends that section 8 will establish time-frames for tribal participation with respect to two proceedings: the voluntary termination of parental rights and voluntary adoptions, however they are styled. Section 8 limits the tribal right to intervene in adoption proceedings by requiring the Indian tribe to either file a notice of intent to intervene or send a written objection to a proposed adoption to the party or the State court within 90 days of receiving notice of an adoptive placement or 30 days after receiving notice of a voluntary adoption proceeding, whichever is later, or the tribe's right to intervene will be deemed waived. In the case of voluntary termination proceedings, as distinguished from adoption proceedings, the Indian tribe must take action within 30 days of having received the requisite notice. The tribal right to intervene may also be waived if the Indian tribe gives written notice of its intent not to intervene or gives written notice that neither birth parent is a member of the tribe

[53] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n. 32 (1978).

or gives written notice that the child is not a member of, and is not eligible for membership in, the Indian tribe.

Under section 8, an Indian tribe must simply make known its intent to intervene or, in writing, its objection to the termination of parental rights or the adoptive placement. The Committee intends that were an Indian tribe sends notice or written objection to the party seeking the adoption, but not to the court, the party receiving such notice shall be expected to notify the court that the tribe has preserved its right of intervention. This is likely to occur in cases where a placement has been made before a court proceeding has begun. The Committee has designed these provisions to give prospective adoptive parents confidence that they can go forward with an adoption after a specified time period without later action by an Indian tribe which may disrupt the adoption. Furthermore, the Committee intends that these provisions will provide an Indian tribe with a reasonable time period within which to become involved in the placement of a child if the tribe believes this would be in the best interest of the Indian child.

Section 8 also provides that if an adoptive placement specified in the notice to the Indian tribe is changed at a later date, the tribal right to intervene is restored even if the time periods have lapsed. Such a change likely would be extremely rare, but in these cases the Indian tribe's involvement in the subsequent placement is just as important for the best interests of the child as was its involvement in the first placement. An Indian tribe must receive notice of each adoptive, preadoptive or foster care family placement within five days of when the placement is made. This provision should ensure that Indian tribes will receive effective notice if an adoptive placement has ended. Finally, if an Indian tribe does not receive notice which compiles with section 7 of these amendments, the Committee intends that the Indian tribe will retain a right to intervene at any point in the voluntary proceeding. The Committee recognizes that there may be circumstances when a child's Indian identity is discovered after the expiration of the time frames for notice and tribal response, despite the fact that the facilitators of an adoption made a reasonable, good faith inquiry concerning the Indian identity of a child at or before the beginning of a placement. In those circumstances, it is the Committee's intention that notice be provided within 10 days of the discovery of a child's Indian identity and that thereafter, the time frames for tribal intervention outlined in section 8 will apply. If, however, there is evidence that a reasonable (i.e. good faith) inquiry was not made concerning the Indian identity of a child on or before the beginning of a placement, the time limitations set forth in section 8 on tribal intervention shall not apply.

The Committee intends that a waiver by an Indian tribe under section 8 does not other wise affect the applicability of the Act to the Indian child and family, including application of the placement preferences, and does not prevent any other person from asserting any rights under the Act. Likewise, the rights of the Indian child's extended family or others to intervene, or otherwise to be involved,

are left to existing laws and court rules on standing are neither increased or diminished by this legislation.[54]

The Committee intends that section 8 will require that an Indian tribe must include with any motion to intervene in a voluntary proceeding, a certification that includes a statement documenting the membership or eligibility for membership of the Indian child. Consistent with long-standing and fundamental principles of Federal Indian law, this section recognizes that tribal determinations of membership under tribal law are conclusive for the purpose of determining whether a child is an Indian child subject to the ICWA and that the Act applies to all Indian children who are subjects of voluntary placements or proceedings. By adding this requirement, it is the Committee's intent to provide assurances to other parties involved with Indian children that Indian tribes will follow a specified set of rules based upon their own membership requirements which they have established under tribal law. Under the new subsection (e)(3), the Committee intends this certification to be filed no later than when the motion to intervene is filed. It need not necessarily be filed when the Indian tribe files its written objection or notice of intent to intervene. The term "motion" is not meant, however, to suggest any particular procedure for intervention. The Committee is aware that in many state courts, informal tribal intervention has been permitted through letter, appearance of a tribal social worker or otherwise. The Committee does not intend in any way to discourage such informal procedures. Rather the language of this subsection is simply meant to make clear that the certification requirement attaches at the actual time of intervention.

Finally, section 8 would allow state courts to enter enforceable orders providing for visitation or continued contact between Indian tribes, birth parents, extended Indian family members, and an adopted child. These orders would arise only in the context of a voluntary agreement entered into with the adoptive family. The Committee anticipates that the possibility of open adoption, as an option in all proceedings, may facilitate harmonious placements of Indian children and avoid conflict in some otherwise contentious situations. In a number of states, courts currently lack any statutory authority to recognize and enforce open adoption arrangements even where the parties have reached an agreement. It is the Committee's intention that this section constitute sufficient legal authority to authorize a state court, if in the court's discretion it wishes to do so, to make enforceable any type of post-adoption arrangement or specific conditions that may be agreed to by the parties to a voluntary adoptive proceeding.

Voluntary termination of parental rights. Section 4 clarifies that the existing provisions of the ICWA which deal with the validation of parental consent before a judge at least 10 days after birth applies to all adoptive, preadoptive and foster care placements. In addition, the Committee intends section 4 to require a judge to certify that the birth parents have been informed of their placement options and of their rights under the ICWA. Finally, the judge must confirm that the adoption agency or attorney which facilitates an

[54] See e.g., *In Re J.R.S.*, 690 P. 2d 10 (Alaska Sup. Ct. 1984).

adoption has certified that the birth parents will be notified within ten days if an adoptive placement changes.

The Committee intends that the additional information required by section 4 will increase the opportunity for birth parents to fully consider their placement options at the very beginning of the process and more fully understand their right to revoke consent, the limitations placed upon that right to revoke, the potential role of the Indian tribe, and the application of the placement preference provisions in the Act. Full information to birth parents, combined with notice to the Indian child's tribe, should help ensure that a young, vulnerable Indian parent has the balanced information available which any person needs to make an informed decision. For example, when only an adoption attorney or agency is involved with a young parent considering adoption, there is a substantial possibility that extended family options will not be explored. The requirement in this section is designed to ensure that all birth parents of Indian children who are involved in a voluntary child custody proceeding understand the multiple options available to them and that they are not presented with only one placement option. Providing parents with full information at the outset of the process should help lessen the number of disputes which can arise later on in the process because parents were unclear about their available options when they placed the child for adoption.

Finally, the requirement in section 4 that the person or agency facilitating the adoption notify a birth parent when the adoptive placement ends is meant to ensure that the parent will be able to exercise his or her right to revoke consent which is guaranteed under these amendments in any circumstance where an adoptive placement is terminated. In addition, the Committee intends that an Indian custodian vested with legal authority to consent to an adoptive placement be treated as a birth parent for the purposes of the Act, including the requirements governing notice provided or received and consent given or revoked.

Withdrawal of parental consent. The Committee intends section 5 to clarify when a birth parent can revoke consent to an adoption or voluntary termination of parental rights before a final decree of adoption has been entered by a court. The revocation period is limited to six months after the Indian child's tribe receives notice of the adoptive placement of the child, which notice must be sent within five days of the actual placement. The revocation period is longer if the birth parent has not received notice of the actual commencement of the legal proceeding to finalize the adoption at least 30 days before the end of that six month period. If the parent has not received such notice, the period for revocation is extended until 30 days after receipt of notice by the parent. The parental right to revoke is also extended if the child's adoptive placement is changed from that which was proposed at the time of the parent's consent. It should be noted that section 5 does not alter the provisions of existing law which terminate, as of the date of the final adoption decree, the parental right to revoke consent if that adoption decree is finalized prior to the end of the six month period. The only exception to this limitation occurs when a birth parent can later show to the court that his or her consent was obtained through fraud or duress, but such a claim may be brought no later than two years

after the final decree of adoption is entered. Finally, the Committee intends the time limits on parental withdrawal of consent to bring consistency and certainty to the adoption process. Prospective adoptive parents will know the time frames during which parental consent can be revoked and need not fear disruption of the adoption at some unknown point in the future.

Notice to Indian tribes. Section 6 requires notice to an Indian tribe of all voluntary adoptive and preadoptive placements, all voluntary termination of parental rights proceedings, all voluntary adoption proceedings and all voluntary foster care placements that exceed 100 days which involve a child defined under current law as an Indian child for purposes of the Act (any child who is a member of an Indian tribe or who may be eligible for membership and is a child of a member of an Indian tribe). Notice would be required within 5 days of an adoptive or preadoptive placement and may be made earlier, even prior to birth, if an adoptive or preadoptive placement is contemplated. The Committee intends the language of the bill to permit a single notice to be sent covering multiple activities—for example, if an adoptive placement is made and an adoption proceeding is commenced simultaneously, the Committee intends that a single notice could be written and provided in such a way as to meet the obligations of section 6 so long as such notice meets the requirements of section 7. The Committee intends that a notice will be sent within the specified time frames each time one of the specified placements or proceedings commences. If it is discovered that a child may be an Indian child after applicable notice periods have run, notice under section 6 must be provided within 10 days of the discovery that the child may be an Indian. In situations where a child's Indian identity is uncovered after notice and placement and notice is provided within 10 days of the discovery, time limitations will be placed upon tribal intervention following such a late notice if the party serving the notice can show to the court that reasonable inquiry regarding whether the child may be an Indian had been made at or prior to placement of the child. With these provisions dealing with a belated discovery that the child may be an Indian and that the adoption is thus made subject to the requirements of the ICWA, the Committee intends to provide prospective adoptive parents with some protection from late intervention if they can show they made a reasonable inquiry at or before the time the placement began as to whether the child may be an Indian. Likewise, the Committee intends these provisions to provide an Indian tribe with prompt notice of the adoption placement and proceeding and some opportunity to intervene within the time limitations applicable under section 8.

Adoption attorneys, state agencies, and others facilitating adoptions are expected to make adequate and good faith inquiries and/or investigations regarding whether a child is an Indian. In that regard, the BIA Guidelines for State Courts,[55] (specifically section B.1.) provide helpful but not exhaustive guidance on circumstances which should lead attorneys and agencies to believe that a child custody involved in a child custody proceeding is Indian.

[55] 44 Federal Register 67584 et seq. (November 26, 1979).

The Committee has received ample testimony indicating that, because the ICWA does not include a specific notice requirement to Indian tribes in the case of voluntary adoptions, Indian tribes frequently do not learn of the adoptive placements until months and sometimes years after the placement has been made. Particularly in the case of an off-reservation birth to an unwed mother—which is the circumstance in a substantial portion of these cases—there may be a significant delay in such information becoming known within the tribal community. Thus, even where an Indian tribe acts promptly upon obtaining the information, a situation may have developed where the Indian child has already spent a significant amount of time in that placement before the Indian tribe any knowledge with which it could act to become involved in the case in the State court, whether through intervention in the proceeding, submitting a request for future contact or visitation, or other involvement. The Committee expects that, under the requirements of the bill, providing Indian tribes with prompt notice in all cases will greatly enhance the possibility that a prospective adoptive parent will know before the initial placement is made, or within a very short time thereafter, whether a member of the Indian child's family or tribe has an interest in adopting the child. The Committee intends the notice required under section 6 to help to ensure that the best interests of Indian children are served by the provision of good and loving families while at the same time ensuring that those best interests of the children are not undermined by children being removed from their families and tribes in cases where good and loving placements are available within their birth families or tribal communities.

Moreover, the Committee wishes to emphasize that an Indian tribe has a parens patriae relationship with all children who are members of the tribe or who are eligible for tribal membership and who are children of tribal members. Off-reservation children and parents, some of whom may be in a precarious or unstable living situation and alienated from their tribal community, are a uniquely vulnerable segment of the American Indian and Alaska Native population and the ICWA specifically recognizes the tribal interest in such individuals and the benefit to these Indian families of tribal involvement. Thus, the Committee has concluded that the best interests of Indian children and families are served by early and full notice to Indian tribes under the provisions of section 6. Although Indian tribes do not currently receive notice of voluntary proceedings in many states, several states have explicitly recognized and successfully implemented a requirement that similar notice be provided in voluntary proceedings.[56]

Content of notice to Indian tribes. Section 7 requires that the notice provided to Indian tribes must include the name of the Indian child involved and the actual or anticipated date and place of birth of the child, along with an identification, if known after reasonable inquiry, of the Indian parent, grandparent, and extended family members of the Indian child. The notice must also provide information about court proceedings pending in state court, if any, and the

[56] See, e.g., Wash. Rev. Code Ann. 13.34.245(3), (5); 26.33.090(2); 26.33.110(2); 26.33.240(1) (West Supp. 1989); Minn. Stat. Ann. 257.352(2), (3); 257.353(2), (3) (West Supp. 1989); Okla. 10 O.S. 1991, section 40.1 (as amended in 1994); Mich. Court Rules 5.980(A).

parties in such proceedings. The notice must inform the Indian tribe that it has the right to intervene in the court proceeding and must inform the tribe as to what actions or inactions by the tribe will lead to a waiver of the tribal right to intervene.

Sanctions against fraudulent representation. Section 9 provides for criminal sanctions to be applied to anyone who assists a person to lie about their Indian ancestry or the ancestry of a child for the purposes of avoiding the application of the ICWA. The Committee intends that these sanctions will apply to any individual, other than a birth parent, who encourage or facilitate fraudulent representations concerning whether or not a child or parent is an Indian for the purposes of the ICWA, who conspires to encourage or facilitate such representations or omissions, or who aids or abets such representations or omissions having reason to know that such representations are being made and may have a material impact upon the application of the ICWA. Criminal penalties are necessary to help assure compliance with the provisions of the ICWA which are triggered whenever an Indian child is involved in a child custody proceeding.[57] Willful misrepresentations of Indian identity can serve to thwart the application of the Act and the intent of the Congress. The criminal sanctions will discourage attorneys and others from circumventing the ICWA. There is considerable anecdotal evidence that birth parents are often told by adoption attorneys and agencies that they should not reveal that the child may be an Indian child in order to avoid the application of the ICWA. Indeed, in the *In re Bridget R* case,[58] which helped give rise to legislation to amend the Indian Child Welfare Act in this Congress, there were substantial allegations that the original adoption attorney involved facilitated the very kind of deception that the criminal sanctions in section 9 are intended to deter. The Committee received testimony which indicates that the birth father of the children in that case indicated he was Indian on the original adoption information sheet, was informed by the attorney that this would delay the adoption, and then filled out a new form omitting the information about his Indian identity which was then used by this attorney for the purposes of the adoption even though the attorney knew that this information was not true. That attorney may face civil damages and professional discipline as a result of these allegations. The Committee intends to bring to bear against such behavior the sanctions of criminal law.

Placement preferences. Section 10 addresses the Act's placement preferences (section 1915 of the Act). Preserving the relationship between Indian children and their parents was of paramount importance to Congress in enacting the ICWA. Congress strove to provide parents with every substantive and procedural protection it could offer without sacrificing fundamental notions of tribal sovereignty or subjecting Indian children to unnecessary risks. Once the termination of the parent-child relationship was imminent, however, Congress created procedures and substantive standards that reflect "a Federal policy that, where possible, an Indian child should remain in the Indian community, * * * and by making sure

[57] The Committee notes that criminal penalties are employed in other contexts to ensure compliance with child custody procedures. See, e.g., OR. REV. STAT. 417.990 (1996).
[58] *In re Bridget R.*, 41 Cal. App. 4th 1483 (2nd Dist. 1996).

that Indian child welfare determinations are not based on a 'white, middle-class standard, which, in many cases, forecloses placement with [an] Indian family.'"[59]

Application of the Act's placement preferences to voluntary adoptions, however, has resulted in widely varying interpretations by state courts and commentators. The source of this disagreement centers on section 1915(a). This provision establishes adoptive placement preferences in favor of a member an Indian child's extended family, another member of the child's tribe, or other Native Americans.[60] State courts are bound by these preferences "in the absence of good cause to the contrary."

This amendment is intended to clarify that, consistent with the Act's objectives and where appropriate, birth parents may express a preference regarding the placement of the child and that this express preference may form part of a court's determination that good cause exists to depart from the Act's placement mandates at the request of a parent or Indian child. The statutory preferences are not altered by this language and the burden of proof to show good cause for departing from them still rests with the party seeking the exception.

The amendments contained in S. 569, including language regarding the expressed wishes of the birth parents, will continue to uphold the goals of the Act and will promote the best interests of Indian children. No single provision of the Act or of these amendments can be read in isolation and without the benefit of the context that gave rise to the ICWA or the objectives the Congress sought to achieve in enacting it, especially those recognized by the Supreme Court in *Holyfield*.

As it relates to the placement preferences in the Act, the Committee views "good cause" as a matter that must be interpreted against the backdrop of these goals and objectives and given the totality of circumstances that are involved in any individual placement situation.

Furthermore, where an individual within the placement preferences seeks to adopt an Indian child, the Committee believes that an evaluation of the applicant's qualifications is necessary to ensure that the proponents of the nonpreferential placement have in fact carried their burden of proving good cause to deviate from the placement preferences. In making such an evaluation, the Committee notes that section 1915(d) defines the standards applicable for evaluating the preferred applicant.

CONCLUSIONS

The ICWA was originally enacted to provide for procedural and substantive protection for Indian children and families and to recognize and formalize a substantial role for Indian tribes in cases involving involuntary child custody proceedings. The bill approved by this Committee is entirely consistent with, and in furtherance of, these same goals which continue to be of vital importance to the

[59] *Holyfield*, 490 U.S. at 37, quoting H. Rep. 95–1386, at p. 24. Significantly, the footnote accompanying this paragraph in the Supreme Court's opinion notes that this placement preferences are directed at state court placement proceedings involving "nondomiciliaries of the reservation."

[60] By contrast, Section 1915(b) is concerned with foster care and preadoptive placements.

well-being of Indian children, Indian families, and Indian tribes. The Committee has concluded that S. 569, as a compromise, will greatly improve the procedures required under the ICWA in cases of voluntary child custody and adoption proceedings. While these voluntary cases are but a small fraction of the cases in which the Act has been applied, they have been the ones which have gained much of the public scrutiny the ICWA has experienced in recent years. In adopting S. 569, the Committee is taking a measured and limited approach, actively crafted by representatives of both the tribal governments and the adoptive family community, to address what have become identified as the problems with how the ICWA functions in the context of voluntary adoptions.

Legislative History

In the 104th Congress, the Committee held a hearing on June 26, 1996, on a draft discussion bill which served as the basis of S. 1962. S. 1962 was introduced on July 16, 1996 and referred to the Committee on Indian Affairs. On July 24, 1996, the Committee on Indian Affairs, by a vote of 13 for, 0 against, and I abstention, ordered the bill reported with the recommendation that the Senate pass the bill as reported. On September 26, 1996, S. 1962 passed the Senate by unanimous consent. No action was taken in the House on S. 1962 in the 104th Congress.

In the 105th Congress, S. 569 was introduced on April 14, 1997. S. 569 largely tracks S. 1962. On June 18, 1997, the Committee held a hearing on S. 569 as introduced. Based upon testimony presented at the hearing, an amendment in the nature of a substitute was prepared by the Chairman of the Committee, Senator Campbell.

Committee Recommendation and Tabulation of Vote

In an open business session on July 30, 1996, the Committee on Indian Affairs, by voice vote, adopted the amendment in the nature of a substitute offered by Senator Campbell and ordered the bill reported to the Senate, with the recommendation that the Senate pass S. 569 as reported.

Section-by-Section Analysis

Section 1. Short title; references

Section 1 cites the short title of the bill as the "Indian Child Welfare Act Amendments of 1997" and clarifies that references in the bill to amendment or repeal relate to the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).

Section 2. Exclusive jurisdiction

Section 2 adds a provision to 25 U.S.C. 1911(a) to clarify that an Indian tribe retains the exclusive jurisdiction it has lawfully acquired over any child otherwise made a ward of the tribal court when the child subsequently changes residence or domicile for treatment or other purposes.

Section 3. Intervention in State court proceedings

Section 3 make a conforming technical amendment conditioning an Indian tribe's existing right of intervention under 25 U.S.C. 1911(c) to the time limitations added by section 8 of the bill.

Section 4. Voluntary termination of parental rights

Section 4 amends 25 U.S.C. 1913(a) to clarify that the Act applies to voluntary consents in adoptive, preadoptive and foster care placements. In addition, section 4 adds a requirement that the presiding judge certify that any attorney or public or private agency facilitating the voluntary termination of parental rights or adoptive placement has informed the birth parents of the placement options available and of the applicable provisions of the Indian Child Welfare Act, and has certified that the birth parents will be notified within 10 days of any change in the adoptive placement. An Indian custodian vested with legal authority to consent to an adoptive placement is to be treated as a parent for purposes of these amendments, including the requirements governing notice provided or received and consent given or revoked.

Section 5. Withdrawal of consent

Section 5 amends the Act by adding several new paragraphs to 25 U.S.C. 1913(b). The additional paragraphs would set limits on when an Indian birth parent may withdraw his or her consent to an adoption. Paragraph (2) would permit revocation of parental consent in only two instances before a final decree of adoption is entered except as proved in paragraph (4). First, a birth parent could revoke his or her consent if the original placement specified by the birth parent terminates before a final decree of adoption has been entered. Second, a birth parent could revoke his or her consent if the revocation is made before the end of a 30 day period that begins on the day that parent received notice of the commencement of the adoption proceeding or before the end of a 180 day period that begins on the day the Indian tribe has received notice of the adoptive placement, whichever period ends first. Paragraph (3) provides that upon the effective revocation of consent by a birth parent under the terms of paragraph (2), the child shall be returned to that birth parent. Paragraph (4) requires that if a birth parent has not revoked his or her consent within the time frames set forth in paragraph (2), thereafter he or she may revoke consent only pursuant to applicable State law or upon a finding by a court of competent jurisdiction that the consent was obtained through fraud or duress. Paragraph (5) provides that upon the effective revocation of consent by a birth parent under the terms of paragraph (4)(B), the child shall be returned to that birth parent and the decree vacated. Paragraph (6) provides that no adoption that has been in effect for a period of longer than or equal to two years can be invalidated under any of the conditions set forth in this section, including those related to a finding of duress or fraud.

Section 6. Notice to Indian tribes

Section 6 requires notice to be provided to the Indian tribe by any person seeking to secure the voluntary placement of an Indian child or the voluntary termination of the parental rights of a par-

ent of an Indian child. The notice must be provided no later than 100 days after a foster care placement occurs, no later than five days after a preadoptive or adoptive placement occurs, no later than ten days after the commencement of a proceeding for the termination of parental rights, and no later than ten days after the commencement of an adoption proceeding. Notice may be given prior to the birth of an Indian child if a particular placement is contemplated. If an Indian birth parent is discovered after the applicable notice periods have otherwise expired, despite a reasonable inquiry having been made on or before the commencement of the placement about whether the child may be an Indian child, the time limitations placed by section 8 upon the rights of an Indian tribe to intervene apply only if the party discovering the Indian birth parent provides notice to the Indian tribe under this section not later than ten days after making the discovery.

Section 7. Content of notice

Section 7 requires that the notice provided under section 6 include the name of the Indian child involved and the actual or anticipated date and place of birth of the child, along with an identification, if known after reasonable inquiry, of the Indian parent, grandparent, and extended family members of the Indian child. The notice must also provide information on the parties and court proceedings pending in State court. The notice must inform the identified Indian tribe that it may have the right to intervene in the court proceeding, and must inquire whether the Indian tribe intends to intervene or waive its right to intervene. Finally, the notice must state that if the Indian tribe fails to respond by the statutory deadline, the right of that Indian tribe to intervene will be considered to have been waived.

Section 8. Intervention by Indian tribe

Section 8 adds four new subsections to 25 U.S.C. 1913, which would limit the right of an Indian tribe to intervene in a court proceeding involving foster care placement, voluntary adoption, or termination of parental rights and which would authorize voluntary agreements for enforceable rights of visitation.

Under subsection (e), an Indian tribe could intervene in a voluntary proceeding to terminate parental rights only if it has filed a notice of intent to intervene or a written objection not later than 30 days after receiving the notice required by sections 6 and 7. An Indian tribe could intervene in a voluntary adoption proceeding only if it has filed a notice of intent to intervene or a written objection not later than the later of 90 days after receiving notice of the adoptive placement or 30 days after receiving notice of the adoption proceeding pursuant to sections 6 and 7. If these notice requirements are not complied with, the Indian tribe could intervene at any time. However, an Indian tribe may no longer intervene in a proceeding after it has provided written notice to a State court of its intention not to intervene or of its determination that neither the child nor any birth parent is a member of that Indian tribe. Finally, subsection (e) would require that an Indian tribe accompany a motion for intervention with a certification that documents the

tribal membership or eligibility for membership of the Indian child under applicable tribal law.

Subsection (f) would clarify that the act or failure to act of an Indian tribe to intervene or not intervene under subsection (e) shall not affect any placement preferences or other rights accorded to individuals under the Act, nor may this preclude an Indian tribe from intervening in a case in which a proposed adoptive placement is changed.

Subsection (g) would prohibit any court proceeding involving the voluntary termination of parental rights or adoption of an Indian child from being conducted before the date that is 30 days after the Indian tribe has received notice under sections 6 and 7.

Subsection (h) would authorize courts to approve, as part of the adoption decree of an Indian child, a voluntary agreement made by an adoptive family that a birth parent, a member of the extended family, or the Indian tribe will have an enforceable right of visitation or continued contact after entry of the adoption decree. However, failure to comply with the terms of such agreement may not be considered grounds for setting aside the adoption decree.

Section 9. Fraudulent representation

Section 9 would add a new section 114 to the Indian Child Welfare Act that would apply criminal sanctions to any person other than a birth parent who—(1) knowingly and willfully falsifies, conceals, or covers up a material fact concerning whether, for purposes of the Act, a child is an Indian child or a parent is an Indian; or (2) makes any false or fraudulent statement, omission, or representation, or falsifies a written document knowing that the document contains a false or fraudulent statement or entry relating to a material fact described in (1). Assisting in the removal of a child from the United States in order to thwart the application of the Act is also prohibited. Upon conviction of an initial violation, a person shall be subjected to the fine prescribed in 18 U.S.C. 3571 for a Class A misdemeanor (not more than $100,000), imprisonment for not more than 1 year, or both. Upon conviction of any subsequent violation, a person shall be subjected to the fine prescribed in 18 U.S.C. 3751 for a felony (not more than $250,000), imprisonment for not more than 5 years, or both.

Section 10. Placement of Indian children

Section 10 clarifies Congress' intent with respect to placement preferences expressed by birth parents. The amendment makes clear that the views of the birth parent may be part of a court's determination that "good cause" exists to deviate from the Act's preferences. Because courts are only to be guided by the birth parent's preferences after they finding (or determining) that it is appropriate to do so, it is imperative that courts review the circumstances surrounding this decision to ensure that it is the product of an informed, rational choice.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 569, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 19, 1997.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 569, the Indian Child Welfare Act Amendments of 1997, as ordered reported by the Senate Committee on Indian Affairs on July 30, 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Justin Latus (for federal costs), Marjorie Miller (for the impact on state, local, and tribal governments), and Bruce Vavrichek (for the impact on the private sector).

Sincerely,

PAUL VAN DE WATER
(For June E. O'Neill, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 569—Indian Child Welfare Act Amendments of 1997

S. 569 would amend the Indian Child Welfare Act (ICWA), including provisions relating to the voluntary termination of parental rights of Indian parents in adoption and foster care cases. CBO estimates that this bill would have no federal budgetary effects. Since enactment of S. 569 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

S. 569 contains both intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA). CBO estimates that the costs of complying with these mandates would be well below the thresholds established by that act ($50 million for intergovernmental and $100 million for private-sector mandates in 1996, adjusted for inflation). The bill would impose no other significant costs on state, local, or tribal governments.

In any action for the adoption of an Indian child or the voluntary termination of parental rights, S. 569 would require that a public or private agency provide written notice to the child's tribe within specified deadlines. Further, the bill provides that prior to placing an Indian child in foster care or adoption or terminating parental rights, a public or private agency must notify the child's parents of the applicable provisions of ICWA. Based on information provided by state officials, CBO estimates that public agencies would not incur significant additional costs as a result of these requirements, because most of these agencies would not have to make substantial changes to their procedures. Likewise, the total cost to private-sector entities of complying with these requirements would not be large.

The bill would also limit or preempt the authority of both tribal and state governments in Indian adoption matters. In order to preserve its right to intervene in such a proceeding, a tribe would be required to provide written notice of its intent to intervene within

specific time periods. To ensure that the tribe has adequate time to give such notice, the bill would preempt state laws by requiring that such proceeding be conducted only after a 30-day period following notification of the child's tribe. These provisions also would not entail significant additional costs for state, local, or tribal governments.

The remaining provisions of S. 569 either do not impose mandates or are excluded from consideration under UMRA by section 4 of the act. That section applies to provisions that enforce the rights of individuals for due process.

The CBO staff contacts are Justin Latus (for federal costs), Majorie Miller (for the impact on state, local, and tribal governments), and Bruce Vavrichek (for the impact on the private sector). This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

Regulatory Impact Statement

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee has concluded that enactment of S. 569 will create only de minimis regulatory or paperwork impacts.

Executive Communications

The Committee has received a letter in support for S. 569 from the Department of Justice on July 28, 1997 and a letter of support for S. 569 from the Department of the Interior on July 29, 1997, which letters are set forth below:

U.S. Department of the Interior,
Office of the Secretary,
Washington, DC, July 28, 1997.

Hon. Don Young,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

Hon. Ben Nighthorse Campbell,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

Dear Chairman Young and Chairman Campbell: We are writing to express the Department of the Interior's (Department) position on H.R. 1082 and its companion bill, S. 569. The Department supports the enactment of H.R. 1082 and S. 569 for the following reasons.

The study which led to the passage of the Indian Child Welfare Act (ICWA) in 1978 supports the proposition that an Indian child's tribe is in a better position than a State or Federal court to make decisions on matters concerning the relationship of an Indian child to his or her tribe. Moreover, the ICWA has preserved the cultural integrity of Indian tribes because it reestablished tribal authority over Indian child custody matters. The ICWA is the essence of child welfare in Indian Country and provides needed protections for Indian children who are neglected under our country's public child welfare system. The ICWA has fulfilled the objective of giving In-

dian tribes the opportunity to intervene on behalf of Indian children eligible for tribal membership in a particular tribe.

Admittedly, there have been problems with certain aspects of the ICWA and those problems should be addressed to ensure that the best interests of Indian children are ultimately considered in all voluntary child custody proceedings. The provisions contained in H.R. 1082 and S. 569 reflect carefully crafted consensus amendments between Indian tribes seeking to protect their children, culture and heritage and the interest of the adoption community seeking greater clarity and certainty in the implementation of the ICWA. First, the amendments will clarify the applicability of the ICWA to voluntary child custody matters so that there are no ambiguities or uncertainties in the handling of these cases. Second, the amendments will ensure that Indian tribes receive notice of voluntary ICWA proceedings and also clarify what should be included in the notices. Timely and adequate notice to tribes will ensure more appropriate and permanent placement decisions for Indian children. Indian parents will be informed of their rights and their children's rights under the act, ensuring that they make informed decisions on the adoptive or foster care placement of their children. When tribes and extended family members are allowed to participate in placement decisions, the risk for disruption will be greatly reduced. While the amendments place limitations on when Indian tribes and families may intervene and when birth parents may withdraw their consent to an adoption, they protect the fundamental rights of tribal sovereignty. Furthermore, the amendments will permit open adoptions, when it is in the best interest of an Indian child, even if State law does not so provide. Under an open adoption, Indian children will have access to their natural family and cultural heritage when it is deemed appropriate.

An important consideration is that upon a tribe's decision to intervene in a voluntary child custody proceeding, the tribe must certify the tribal membership status of an Indian child or their eligibility for membership according to tribal law or custom. Thus, there would be no question that a child is Indian under the ICWA thereby ensuring that tribal membership determinations are not made arbitrarily. Lastly, the amendments will provide for criminal sanctions to discourage fraudulent practices by individuals or agencies which knowingly misrepresent or fail to disclose whether a child or the birth parent(s) are Indian to circumvent the application of the ICWA.

In summary, the tribally developed amendments contained in H.R. 1082 and S. 569 clearly address the concerns which led to the introduction of Title III of H.R. 3286 (104th Congress), including time frames for ICWA notifications, timely interventions, and sanctions, definitive schemes for intervention, limitations on the time for biological parents to withdraw consent to adoptive placements, and finality in voluntary proceedings.

We want to express our grave concerns that the objectives of the ICWA continue to be frustrated by State court judicial exceptions to the ICWA. We are concerned that State court judges who have created the "existing Indian family exception" are delving into sensitive and complicated areas of Indian cultural values, customs and practices which under existing law have been left exclusively to the

judgment of Indian tribes. Legislation introduced last year, including H.R. 3286, sought to ratify the "existing Indian family exception" by amending the ICWA to codify this State-created concept. The Senate Committee on Indian Affairs, in striking Title III from H.R. 3286, made clear its views that the concept of the "existing Indian family exception" is in direct contradiction to existing law. In rejecting the "existing Indian family exception" concept, the Committee stated that "the ICWA recognizes that the Federal trust responsibility and the role of Indian tribes as parens patriae extend to all Indian children involved in all child custody proceedings." [Report 104–335 accompanying S. 1962, 104th Cong., 2nd Session.]

The Department of the Interior's position on the emerging "existing Indian family exception" concept is the same as previously stated in the Administration's statement of policy issued on May 9, 1996. We oppose any legislative recognition of the concept.

The Department's position is that the ICWA must continue to provide Federal protections for Indian families, tribes and Indian children involved in any child custody proceeding, regardless of their individual circumstances. Thus, the Department fully concurs with the Senate Committee on Indian Affairs' assessment and rejection of the "existing Indian family exception" concept and all of its manifestations. We share the expressed concerns of tribal leaders and a majority of your Committee members about continuing efforts to amend the ICWA, particularly those bills which would seriously limit and weaken the existing ICWA protections available to Indian tribes and children in voluntary foster care and adoption proceedings.

The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of Indian tribal membership, is fundamental to this relationship. The Congress, after ten years of study, passed the Indian Child Welfare Act of 1978 (Pub. L. 95–608) as a means to remedy the many years of widespread separation of Indian children from their families. The ICWA established a successful dual system that establishes exclusive tribal jurisdiction over Indian Child Welfare cases arising in Indian County, and presumes tribal jurisdiction in the cases involving Indian children, yet allows concurrent State jurisdiction in Indian child adoption and child custody proceedings where good cause exists. This system, which authorizes tribal involvement and referral to tribal courts, has been successful in protecting the interests of Indian tribal governments, Indian children and Indian families for the past eighteen years.

Because the proposed amendments contained in H.R. 1082 and S. 569 will strengthen the Act and continue to protect the lives and future of Indian children, the Department fully embraces the provisions of H.R. 1082 and S. 569.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ADA E. DEER,
Assistant Secretary, Indian Affairs.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington DC, July 29, 1997.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for the opportunity to provide the views of the Department of Justice on S. 569, and its companion bill H.R. 1082, which would amend the Indian Child Welfare Act of 1978.

As the United States has rarely been party to litigation under the statute, the Department of Justice's experience with the Indian Child Welfare Act, 25 U.S.C. 1901 *et seq.* ("ICWA") is limited. However, we have reviewed the bill in light of our experience with civil and criminal enforcement, the United States' commitment to supporting tribal self-government, and basic principles of statutory construction. We hope the following comments will be helpful to the Committee in considering the bill.

The Department supports S. 569, H.R. 1082, and the important purposes of ICWA to promote the best interests of Indian children and the stability and security of Indian tribes and families. We support the companion bills because they would clarify ICWA's application to voluntary proceedings, establish some deadlines to provide certainty and reduce delay in custody proceedings, and strengthen federal enforcement tools to ensure compliance with the statute in the first instance. Also, the provisions for adequate and timely notice to Indian tribes and Indian parents in S. 569 and H.R. 1082 would increase the likelihood of informed decision-making by parties to the adoption or foster placement.

The provisions in the proposed legislation amend ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. We understand that S. 569, and its companion bill H.R. 1082, reflect a carefully crafted agreement between Indian tribes and adoption attorneys designed to make Indian child adoption and custody proceedings more fair, swift, and certain.

We appreciate the efforts that you, Chairman Young, and your respective Committees have made to propose amendments to strengthen ICWA. If we may be of additional assistance, please do not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

ANDREW FOIS,
Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the enactment of S. 1962 will result in the following changes in 25 U.S.C. § 1901 et seq., with existing language which is to be deleted in black brackets and the new language to be added in italic:

25 U.S.C. 1911(a)

§ 1911. Indian tribe jurisdiction over Indian child custody proceeding

(a)*(1)* EXCLUSIVE JURISDICTION.—An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. [Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.]

(2) An Indian tribe shall retain exclusive jurisdiction over any child custody proceeding that involves an Indian child, notwithstanding any subsequent change in the residence or domicile of the Indian child, in any case in which the Indian child—

(A) resides or is domiciled within the reservation of the Indian tribe and is made a ward of a tribal court of that Indian tribe; or

(B) after a transfer of jurisdiction is carried out under subsection (b), becomes a ward of a tribal court of that Indian tribe.

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25 U.S.C. 1911(c)

(c) STATE COURT PROCEEDINGS; INTERVENTION.—[In any State court proceeding] *Except as provided in section 103(e), in any State court proceeding* for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have right to intervene at any point in the proceeding.

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25 U.S.C. 1913(a)

§ 1913. Parental rights, voluntary termination

(a) CONSENT; RECORD; CERTIFICATION MATTERS; INVALID CONSENTS.—

(1) Where any parent or Indian custodian voluntarily consents to a [foster care placement] *foster care or preadoptive or adoptive placement* or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding [judge's certificate that the terms] *judge's certificate that—*

(A) the terms and consequences of the consent were fully explained in detail and were fully understood by the partent [or Indian custodian.] *or Indian custodian; and*

(B) any attorney or public or private agency that facilitates the voluntary termination of parental rights or preadoptive or adoptive placement has informed the natural parents of the placement options with respect to the child involved, has informed those parents of the applicable

provisions of this Act, and has certified that the natural parents will be notified within 10 days of any change in the adoptive placement.

[The court shall also certify]

(2) The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.

[Any consent given prior to,]

(3) Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(4) An Indian custodian who has the legal authority to consent to an adoptive placement shall be treated as a parent for the purposes of the notice and consent to adoption provisions of this Act.

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25 U.S.C. 1913(b)

(b) FOSTER CARE PLACEMENT; WITHDRAWAL OF CONSENT.—

(1) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(2) Except as provided in paragraph (4), a consent to adoption of an Indian child or voluntary termination of parental rights to an Indian child may be revoked, only if—

(A) no final decree of adoption has been entered; and

(B)(i) the adoptive placement specified by the parent terminates; or

(ii) the revocation occurs before the later of the end of—

(I) the 180-day period beginning on the date on which the Indian child's tribe receives written notice of the adoptive placement provided in accordance with the requirements of subsections (c) and (d); or

(II) the 30-day period beginning on the date on which the parent who revokes consent receives notice of the commencement of the adoption proceeding that includes an explanation of the revocation period specified in this subclause.

(3) The Indian child with respect to whom a revocation under paragraph (2) is made shall be returned to the parent who revokes consent immediately upon an effective revocation under that paragraph.

(4) Subject to paragraph (6), if, by the end of the applicable period determined under subclause (I) or (II) of paragraph (2)(B)(ii), a consent to adoption or voluntary termination of parental rights has not been revoked, beginning after that date, a parent may revoke such a consent only—

(A) pursuant to applicable State law; or

(B) if the parent of the Indian child involved petitions a court of competent jurisdiction, and the court finds that the consent to adoption or voluntary termination of parental rights was obtained through fraud or duress.

(5) Subject to paragraph (6), if a consent to adoption or voluntary termination of parental rights is revoked under paragraph (4)(B), with respect to the Indian child involved—

(A) in a manner consistent with paragraph (3), the child shall be returned immediately to the parent who revokes consent; and

(B) if a final decree of adoption has been entered, that final decree shall be vacated.

(6) Except as otherwise provided under applicable State law, no adoption that has been in effect for a period longer than or equal to 2 years may be invalidated under this subsection.

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25 U.S.C. 1913(c)

[(c) VOLUNTARY TERMINATION OF PARENTAL RIGHTS OR ADOPTIVE PLACEMENT; WITHDRAWAL OF CONSENT; RETURN OF CUSTODY.—In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.]

(c)(1) A party that seeks the voluntary placement of an Indian child or the voluntary termination of the parental rights of a parent of an Indian child shall provide written notice of the placement or proceeding to the Indian child's tribe. A notice under this subsection shall be sent by registered mail (return receipt requested) to the Indian child's tribe, not later than the applicable date specified in paragraph (2) or (3).

(2)(A) Except as provided in paragraph (3), notice shall be provided under paragraph (1) in each of the following cases:

(i) Not later than 100 days after any foster care placement of an Indian child occurs.

(ii) Not later than 5 days after any preadoptive or adoptive placement of an Indian child.

(iii) Not later than 10 days after the commencement of any proceeding for a termination of parental rights to an Indian child.

(iv) Not later than 10 days after the commencement of any adoption proceeding concerning an Indian child.

(B) A notice described in subparagraph (A)(ii) may be provided before the birth of an Indian child if a party referred to in paragraph (1) contemplates a specific adoptive or preadoptive placement.

(3) If, after the expiration of the applicable period specified in paragraph (2), a party referred to in paragraph (1) discovers that the child involved may be an Indian child—

(A) the party shall provide notice under paragraph (1) not later than 10 days after the discovery; and

(B) any applicable time limit specified in subsection (e) shall apply to the notice provided under subparagraph (A) only if the party referred to in paragraph (1) has, on or before commencement of the placement made reasonable inquiry concerning whether the child involved may be an Indian child.

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25 U.S.C. 1913(d)

[(d) COLLATERAL ATTACK; VACATION OF DECREE AND RETURN OF CUSTODY; LIMITATIONS.—After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.]

(d) Each written notice provided under section (c) shall be based on a good faith investigation and shall contain the following:

(1) The name of the Indian child involved, and the actual or anticipated date and place of birth of the Indian child.

(2) A list containing the name, address, date of birth, and (if applicable the maiden name of each Indian parent and grandparent of the Indian child, if—

(A) known after inquiry of—

(i) the birth parent placing the child or relinquishing parental rights; and

(ii) the other birth parent (if available); or

(B) otherwise ascertainable through other reasonable inquiry.

(3) A list containing the name and address of each known extended family member (if any), that has priority in placement under section 105.

(4) A statement of the reasons why the child involved may be an Indian child.

(5) The names and addresses of the parties involved in any applicable proceeding in a State court.

(6)(A) The name and address of the State court in which a proceeding referred to in paragraph (5) is pending, or will be filed; and

(B) the date and time of any related court proceeding that is scheduled as of the date on which the notice is provided under this subsection.

(7) If any, the tribal affiliation of the prospective adoptive parents.

(8) The name and address of any public or private social service agency or adoption agency involved.

(9) An identification of any Indian tribe with respect to which the Indian child or parent may be member.

(10) A statement that each Indian tribe identified under paragraph (9) may have the right to intervene in the proceeding referred to in paragraph (5).

(11) An inquiry concerning whether the Indian tribe that receives notice under subsection (c) intends to intervene under subsection (e) or waive any such right to intervention.

(12) A statement that, if the Indian tribe that receives notice under subsection (c) fails to respond in accordance with subsection (e) by the applicable date specified in that subsection, the right of that Indian tribe to intervene in the proceeding in-

volved shall be considered to have been waived by that Indian tribe.

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25 U.S.C. 1913

(e)(1) The Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court only if—

(A) in the case of a voluntary proceeding to terminate parental rights, the Indian tribe sent a notice of intent to intervene or a written objection to the adoptive placement to the court or the party that is seeking the voluntary placement of the Indian child, not later than 30 days after receiving notice that was provided in accordance with the requirements of subsections (c) and (d); or

(B) in the case of a voluntary adoption proceeding, the Indian tribe sent a notice of intent to intervene or a written objection to the adoptive placement to the court or party that is seeking the voluntary placement, not later than the later of—

(i) 90 days after receiving notice of the adoptive placement that was provided in accordance with the requirements of subsections (c) and (d); or

(ii) 30 days after receiving a notice of the voluntary adoption proceeding that was provided in accordance with the requirements of subsections (c) and (d).

(2)(A) Except as provided in subparagraph (B), the Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court in any case in which the Indian tribe did not receive written notice provided in accordance with the requirements of subsections (c) and (d).

(B) An Indian tribe may not intervene in any voluntary child custody proceeding in a State court if the Indian tribe gives written notice to the state court or any party involved of—

(i) the intent of the Indian tribe not to intervene in the proceeding; or

(ii) the determination by the Indian tribe that—

(I) the child involved is not a member of, or is not eligible for membership in, the Indian tribe; or

(II) neither parent of the child is a member of the Indian tribe.

(3) If an Indian tribe files a motion for intervention in a State court under this subsection, the Indian tribe shall submit to the court, at the same time as the Indian tribe files that motion, a tribal certification that includes a statement that documents, with respect to the Indian child involved, the membership or eligibility for membership of that Indian child in the Indian tribe under applicable tribal law.

(f) Any act or failure to act of an Indian tribe under subsection (e) shall not—

(1) affect any placement preference or other right of any individual under this Act;

(2) preclude the Indian tribe of the Indian child that is the subject of an action taken by the Indian tribe under subsection

(e) from intervening in a proceeding concerning that Indian child if a proposed adoptive placement of that Indian child is changed after that action is taken; or

(3) except as specifically provided in subsection (e), affect the applicability of this Act.

(g) Notwithstanding any other provision of law, no proceeding for a voluntary termination of parental rights or adoption of an Indian child may be conducted under applicable State law before the date that is 30 days after the Indian child's tribe receives notice of that proceeding that was provided in accordance with the requirements of subsections (c) and (d).

(h) Notwithstanding any other provision of law (including any State law)—

(1) a court may approve, as part of an adoption decree of an Indian child, an agreement that states that a birth parent, an extended family member, or the Indian child's tribe shall have an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption; and

(2) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph (1) shall not be considered to be grounds for setting aside a final decree of adoption.

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25 U.S.C. 1915(c)

Where appropriate, the preference of the [Indian child or parent] *parent or Indian child* shall be considered[:]. [Provided, That where] *In any case in which a court determines that it is appropriate to consider the preference of a parent or Indian child, for purposes of subsection (a), that preference may be considered to constitute good cause. In any case in which* a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

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U.S.C. 1924

SEC. 114. FRAUDULENT REPRESENTATION.

(a) IN GENERAL.—With respect to any proceeding subject to this Act involving an Indian child or a child who may be considered to be an Indian child for purposes of this Act, a person, other than a birth parent of the child, shall, upon conviction, be subject to a criminal sanction under subsection (b) if that person knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device, a material fact concerning whether, for purposes of this Act—

(A) a child is an Indian child; or

(B) a parent is an Indian; or

(2)(A) makes any false, fictitious, or fraudulent statement, omission, or representation; or

(B) falsifies a written document knowing that the document contains a false, fictitious, or fraudulent statement or entry relating to a material fact described in paragraph (1);

(3) assist any person in physically removing a child from the United States in order to obstruct the application of this Act.

(b) CRIMINAL SANCTIONS.—The criminal sanctions for a violation referred to in subsection (a) are as follows:

(1) For an initial violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 1 year or both.

(2) For any subsequent violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 5 years, or both.

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